

Objection Deadline: January 6, 2010 at 4:00 p.m. (Prevailing Eastern Time)
Hearing Date and Time: January 13, 2010 at 10:00 a.m. (Prevailing Eastern Time)

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**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X	
In re	: Chapter 11 Case No.
	:
LEHMAN BROTHERS HOLDINGS INC., et al.,	: 08-13555 (JMP)
	:
Debtors.	: (Jointly Administered)
-----X	

**NOTICE OF DEBTORS' MOTION TO STRIKE WILLIAM KUNTZ'S
NOTICE OF APPEAL OF THE ORDER AUTHORIZING LEHMAN
COMMERCIAL PAPER INC. TO PURCHASE FAIRPOINT PARTICIPATION
OR, IN THE ALTERNATIVE, TO DISMISS WILLIAM KUNTZ'S APPEAL**

PLEASE TAKE NOTICE that a hearing on the annexed Motion of Lehman Brothers Holdings Inc. ("LCPI") and its affiliated debtors in the above-referenced chapter 11 cases (together, the "Debtors") to strike from the record of these cases the notice of appeal of the order of this Court, entered on October 16, 2009, authorizing LCPI to purchase a participation in the loan known as FairPoint Communications Term Loan A from Variable Funding Trust 2008-1 [Docket No. 5551] (the "FairPoint Order") filed by William Kuntz, III ("Kuntz") or, in the alternative, to dismiss Kuntz's appeal of the FairPoint Order, all as more fully described in the Motion, will be held before the Honorable James M. Peck, United States Bankruptcy Judge, at the United States Bankruptcy Court, Alexander Hamilton Customs House, Courtroom 601, One Bowling Green, New York, New York 10004 (the "Bankruptcy Court"), on **January 13, 2010 at 10:00 a.m. (Prevailing Eastern Time)** (the "Hearing").

PLEASE TAKE FURTHER NOTICE that objections, if any, to the Motion shall be in writing, shall conform to the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") and the Local Rules of the Bankruptcy Court for the Southern District of New York, shall set forth the name of the objecting party, the basis for the objection and the specific grounds thereof, shall be filed with the Bankruptcy Court electronically in accordance with General Order M-242 (which can be found at www.nysb.uscourts.gov) by registered users of the Bankruptcy Court's case filing system and by all other parties in interest, on a 3.5 inch disk, preferably in Portable Document Format (PDF), WordPerfect, or any other Windows-based word processing format (with two hard copies delivered directly to Chambers), and shall be served upon: (i) the chambers of the Honorable James M. Peck, One Bowling Green, New York, New York 10004,

Courtroom 601; (ii) Weil Gotshal & Manges LLP, 767 Fifth Avenue, New York, New York 10153, Attn: Jacqueline Marcus, Esq., attorneys for the Debtors; (iii) the Office of the United States Trustee for the Southern District of New York (the "U.S. Trustee"), 33 Whitehall Street, 21st Floor, New York, New York 10004 Attn: Andy Velez-Rivera, Esq., Paul Schwartzberg, Esq., Brian Masumoto, Esq., Linda Riffkin, Esq., and Tracy Hope Davis, Esq.; and (iv) Milbank, Tweed, Hadley & McCloy LLP, 1 Chase Manhattan Plaza, New York, New York 10005, Attn: Dennis F. Dunne, Esq., Dennis O'Donnell, Esq., and Evan Fleck, Esq., attorneys for the Official Committee of Unsecured Creditors appointed in these cases, so as to be so filed and received by no later than **January 6, 2010 at 4:00 p.m. (prevailing Eastern Time)** (the "Objection Deadline").

PLEASE TAKE FURTHER NOTICE that if an objection to the Motion is not received by the Objection Deadline, the relief requested shall be deemed unopposed, and the Bankruptcy Court may enter an order granting the relief sought without a hearing.

PLEASE TAKE FURTHER NOTICE that objecting parties are required to attend the Hearing, and failure to appear may result in relief being granted or denied upon default.

Dated: December 16, 2009
New York, New York

/s/Jacqueline Marcus

Jacqueline Marcus

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Attorneys for Debtors
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OR, IN THE ALTERNATIVE, TO DISMISS WILLIAM KUNTZ'S APPEAL**

TO THE HONORABLE JAMES M. PECK
UNITED STATES BANKRUPTCY JUDGE:

Lehman Commercial Paper Inc. ("LCPI") and its affiliated debtors in the above-referenced chapter 11 cases, as debtors in possession (together, the "Debtors"), respectfully submit this motion (the "Motion") to strike from the record of these cases the notice of appeal (the "Notice of Appeal") of the Order Authorizing Lehman Commercial Paper Inc. to Purchase Fairpoint Participation, entered on October 16, 2009 [Docket No. 5551] (the "FairPoint Order"), filed by William Kuntz, III ("Kuntz") or, in the alternative, to dismiss Kuntz's appeal of the FairPoint Order (the "Appeal"), from the record of these cases and respectfully represent:

Preliminary Statement

1. Kuntz, who is no stranger to this Court or the court system in general, appeared just three days into these cases, not as a concerned creditor genuinely asserting his

rights in accordance with the procedures of this Court and the laws and rules governing these cases, but, rather, as an individual lacking respect for such procedures and the resources of this Court and the Debtors' estates. Once again and in accordance with his past practices, Kuntz has ignored the procedures of this Court by untimely filing a motion to enlarge the period to appeal the FairPoint Order without noticing it for hearing and untimely filing a notice of appeal (the "Notice of Appeal") of the FairPoint Order to the United States District Court for the Southern District of New York (the "District Court"), forcing the Debtors to expend their resources responding and taking up more of this Court's valuable time.

2. While filing a notice of appeal ordinarily divests this Court of jurisdiction and transfers the issue being appealed to the District Court, one significant exception to that general rule is when, as here, the notice of appeal is not timely filed. Under such circumstances, the Court has authority to consider and rule upon a motion to strike the notice of appeal. Accordingly, the Debtors respectfully request that the Court strike the Notice of Appeal from the record of these cases. In the alternative, should this Court decline to strike the Notice of Appeal, then the Debtors respectfully request that the Court dismiss the Appeal for the same reasons set forth herein.

3. Although Kuntz is a *pro se* litigant, under well-established law he must adhere to all rules of procedure, including with respect to the timely filing of appeals. Because Rule 8002(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") is jurisdictional, Kuntz's failure to follow the applicable statutory procedures is fatal to the validity of his appeal of the FairPoint Order. Moreover, although Kuntz has filed a motion pursuant to Bankruptcy Rule 8002(c) seeking to extend the time in which to file a notice of appeal (the "Motion to Extend"), the Motion to Extend was itself filed untimely and was never noticed for

hearing or prosecuted by Kuntz. Accordingly, the Notice of Appeal should be stricken from the record of these cases or, alternatively, the Appeal should be dismissed.

Background

4. Commencing on September 15, 2008 and periodically thereafter (as applicable, the “Commencement Date”), Lehman Brothers Holdings Inc. and certain of its subsidiaries, including LCPI, commenced with this Court voluntary cases under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”). The Debtors’ chapter 11 cases have been consolidated for procedural purposes only and are being jointly administered pursuant to Bankruptcy Rule 1015(b). The Debtors are authorized to operate their businesses and manage their properties as debtors in possession pursuant to sections 1107(a) and 1108 of the Bankruptcy Code.

5. On September 17, 2008, the United States Trustee for the Southern District of New York (the “U.S. Trustee”) appointed the statutory committee of unsecured creditors pursuant to section 1102 of the Bankruptcy Code (the “Creditors’ Committee”).

6. On September 19, 2008, a proceeding was commenced under the Securities Investor Protection Act of 1970 (“SIPA”) with respect to Lehman Brothers Inc. (“LBI”). A trustee appointed under SIPA is administering LBI’s estate.

7. On January 19, 2009, the U.S. Trustee appointed Anton R. Valukas as examiner in the above-captioned chapter 11 cases (the “Examiner”) and by order, dated January 20, 2009 [Docket No. 2583] the Court approved the U.S. Trustee’s appointment of the Examiner.

The FairPoint Order

8. On September 17, 2009, LCPI filed the Motion of Lehman Commercial Paper Inc. Pursuant to Section 363 of the Bankruptcy Code and Bankruptcy Rule 6004 for

Authorization to Purchase FairPoint Participation [Docket No. 5199] (the “FairPoint Motion”).

The FairPoint Motion requested, among other things, authorization for LCPI to purchase a participation in the loan known as FairPoint Communications Term Loan A (the “FairPoint Participation”) from Variable Funding Trust 2008-1.

9. On October 2, 2009, Kuntz filed an omnibus objection [Docket No. 5333] (the “Objection”) to the FairPoint Motion as well as a separate unrelated motion filed by LCPI for authorization to enter into certain transactions related to the SunCal chapter 11 cases currently pending in the United States Bankruptcy Court for the Central District of California (the “SunCal Motion”). On October 7, 2009, the Court held a hearing on the SunCal Motion, which Kuntz failed to attend. The Court granted the SunCal Motion and overruled Kuntz’s objection to the SunCal Motion, characterizing Kuntz’s objections as, among other things, “not relevant to the matter before the Court” *See* Tr. of Oct. 7, 2009 Hr’g, at 13:13– 14 (attached hereto as Exhibit A).

10. On October 14, 2009, the Court held a hearing on the FairPoint Motion, which Kuntz also failed to attend. The Court granted the FairPoint Motion at the hearing, and indicated that the Objection was “inapposite to the motion.” *See* Tr. of Oct. 14, 2009 Hr’g, at 31:16 (an excerpt of which is attached hereto as Exhibit B). The Court further incorporated its disposition of the Objection from the record of the SunCal Hearing into the record of the FairPoint Hearing. *See Id.* at 30: 7-10.

11. On October 16, 2009, the Court entered the FairPoint Order, authorizing LCPI’s purchase of the FairPoint Participation, effective immediately notwithstanding the stay pursuant to Bankruptcy Rule 6004(h).

Kuntz's Procedurally Improper Attempts to Appeal the FairPoint Order

12. On October 27, 2009, Kuntz filed with this Court a motion to extend the time to appeal the Order Denying Stay Relief (the "Motion to Extend") [Docket No. 5718]. Disregarding procedural rules, Kuntz untimely filed the Motion to Extend. The Order was dated October 16, 2009, requiring Kuntz to file a Motion to extend on or before October 26, 2009. *See* Fed. R. Bankr. P. 8002 (requiring a request to extend the time for filing a notice of appeal to be made within ten days of the date of the entry of the appealed order absent a showing of excusable neglect). In addition to being filed untimely, the Motion to Extend did not set a hearing date, as required by the Amended Order Implementing Certain Notice and Case Management Procedures, dated February 13, 2009 (the "Case Management Order") [Docket No. 2837], and Kuntz, not surprisingly, never prosecuted the Motion to Extend. As a result, this Court has not ruled on the Motion to Extend. Putting aside the procedural deficiencies of the Motion to Extend, the relief requested in the Motion to Extend was moot as LCPI had already purchased the FairPoint Participation.

13. Notwithstanding that the Court had not ruled on the Motion to Extend, on November 16, 2009 – 31 days after the entry of the FairPoint Order – Kuntz filed the Notice of Appeal [Docket No. 5853] seeking to appeal the FairPoint Order. Accordingly, the appeal was untimely under Bankruptcy Rule 8002(a). *See* Fed. R. Bankr. P. 8002(a) ("The notice of appeal shall be filed with the clerk within 10 days of the date of the entry of the judgment, order, or decree appealed from.").

14. On December 1, 2009 and again disregarding procedural rules, Kuntz filed the statement of issues on appeal and designation of items to be included in the record on appeal (the "Statement of Issues and Designation") [Docket No. 6017]. Bankruptcy Rule 8006 requires

that an appellant file a designation of the items to be included in the record on appeal and a statement of the issues to be presented within 10 days of filing the notice of appeal. *See* Fed. R. Bankr. P. 8006. Thus, Kuntz's Statement of Issues and Designation was also untimely filed.

15. On December 11, 2009, out of an abundance of caution, the Debtors filed their statement of issues and counter-designation of additional items to be included in the record on appeal in response to Kuntz's Statement of Issues and Designation [Docket No. 6133].

Jurisdiction

16. This Court has jurisdiction to consider this matter pursuant to 28 U.S.C. §§ 157 and 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b). Venue is proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409.

17. Although ordinarily the filing of a notice of appeal deprives a bankruptcy court of jurisdiction to proceed with matters related to such appeal, *see* Fed. R. Bankr. P. 8001(a), where, as here, a notice of appeal is *untimely* filed, the bankruptcy court properly may adjudicate a motion to strike the notice of appeal or, in the alternative, dismiss the untimely appeal. *See, e.g., Williams v. EMC Mortgage Corp. (In re Williams)*, 216 F.3d 1295, 1296 (11th Cir. 2000) (upholding district court's affirmance of bankruptcy court's dismissal of appeal for untimeliness); *Stepflug v. Fed. Land Bank of St. Paul*, 790 F.2d 47, 51 (7th Cir. 1986) (bankruptcy court granted appellee's motion to dismiss untimely appeal and district court affirmed; court of appeals ultimately reversed on grounds other than the bankruptcy court's jurisdiction to decide motion to dismiss); *Gravel & Shea v. Vt. Nat'l Bank*, 162 B.R. 969, 972 n.2 (D. Vt. 1993) (noting that "the Bankruptcy Court could consider the timeliness of [a] notice of appeal in the context of a motion to dismiss the appeal as untimely filed," but because the question of timeliness of the notice had not been presented to the Bankruptcy Court, the District

Court must determine whether to dismiss the appeal as untimely); *In re Bushnell*, 273 B.R. 359, 360 (Bankr. D. Vt. 2001) (granting motion to dismiss untimely appeal); *Beiwel v. Sallie Mae Servicing (In re Beiwel)*, No. 00-00112-W, 2001 WL 753778, at *3 (Bankr. N.D. Iowa June 12, 2001) (granting motion to dismiss untimely *pro se* appeal). Thus, as discussed more fully below, because Kuntz's Notice of Appeal was not timely filed, this Court has jurisdiction to adjudicate the Motion and strike the Notice of Appeal.

The Notice of Appeal Should be Stricken from the Record.

I. Kuntz's Failure to Timely File a Notice of Appeal Precludes Appellate Review.

18. Kuntz's appeal of the Order is invalid and precludes review by the District Court. The timely filing of an appeal of a bankruptcy court's order is essential to the validity of the appeal. Bankruptcy Rule 8001(a) provides:

(a) *Appeal as of Right; How Taken.* An appeal from a judgment, order, or decree of a bankruptcy judge to a district court or bankruptcy appellate panel . . . shall be taken by filing a notice of appeal with the clerk *within the time* allowed by Rule 8002. An appellant's failure to take any step *other than timely filing the notice of appeal* does not affect the validity of the appeal, but is ground only for such action as the district court or bankruptcy appellate panel deems appropriate, which may include dismissal of the appeal.

Fed. R. Bankr. P. 8001(a). The statutory language clearly provides that an appeal from a bankruptcy court's order is valid only if the notice of appeal is filed within the ten-day time period set forth in Bankruptcy Rule 8002. *See* Fed. R. Bankr. P. 8002(a). As the Notice of Appeal was filed outside the ten-day period, the Appeal is invalid.

19. Significantly, the ten-day period is strictly construed, and courts require strict compliance with its terms. *Twins Roller Corp. v. Roxy Roller Rink Joint Venture*, 70 B.R. 308, 310 (S.D.N.Y. 1987); *Stephen Rose & Partners, Ltd. v. Togut, Segal & Segal (In re Satellite*

Sys. Corp.), 73 B.R. 610, 611 (S.D.N.Y. 1987). Further, Bankruptcy Rule 8002(a) is jurisdictional, such that “[f]ailure to file a timely notice of appeal thus deprives the district court of jurisdiction to review the bankruptcy court’s order or judgment.” *Twins Roller Corp.*, 70 B.R. at 310 (collecting cases); *accord Peryea v. Town of Plattsburgh (In re Peryea)*, No. 96-5041, 1997 WL 50015, at *2 (2d Cir. Jan. 17, 1997); *Montco, Inc. v. Barr (In re Emergency Beacon Corp.)*, 666 F.2d 754, 758 (2d Cir. 1981); *Joslin v. Wechsler (In re Wechsler)*, 246 B.R. 490, 492 (S.D.N.Y. 2000); *In re Satellite Sys. Corp.*, 73 B.R. at 611; *French Bourekas, Inc. v. Turner*, 199 B.R. 807, 813 (E.D.N.Y. 1996) (“The failure to file a notice of appeal within the ten-day period is a jurisdictional defect, which requires dismissal of the appeal.”); *In re Bushnell*, 273 B.R. at 362-63 (collecting cases supporting the “well settled” principle that “the filing requirements of [Bankruptcy] Rule 8002 are jurisdictional and failure to timely file a notice of appeal precludes appellate review.”). Thus, the District Court is without jurisdiction to review the Order.

20. Most recently, *In re Loral Space & Communications Ltd., et al.*, Judge Drain granted the reorganized debtors’ motion to dismiss an appeal of this Court’s order that was filed by a *pro se* litigant one day after the expiration of the statutory period for filing a notice of appeal. Case no. 03-41710 (RDD), Order at 2-3 (Bankr. S.D.N.Y. June 18, 2009), attached hereto as Exhibit C. Judge Drain did not issue a written opinion regarding the reorganized debtors’ motion to dismiss the untimely appeal. However, while ruling from the bench, Judge Drain addressed the jurisdictional issue and found the following:

Generally speaking, the filing of a notice of appeal divests the lower court of jurisdiction over matters covered by the appeal. However, the timely filing of a notice of appeal is mandatory in jurisdiction. If the notice is not timely filed, the Appellate Court is without jurisdiction to hear the appeal

More specifically, this issue has been addressed by, at least, one court directly. Where the court found that the Bankruptcy Court

had jurisdiction to consider the timeliness of the notice of appeal as this ruling said. The notice of appeal from the final order generally deprives a lower court over [sic] jurisdiction over the merits of the matter subject to appeal. However, the Bankruptcy Court retains certain authority concerning the timeliness of the appeal. Including, for example, the authority to extend the period of time for filing a notice of appeal, pursuant to Rule 8002(c)

So I believe that it is appropriate for me to decide this issue.

See Tr. of June 16, 2009 Hr'g at 11:21 – 12:16, case no. 03-41710 (RDD), attached hereto as Exhibit D. Judge Drain's bench-ruling is consistent with the statutory language of Bankruptcy Rule 8001(a) and related case law. See Fed. R. Bank. P. 8001(a).

21. In this case, the Order was entered on the Court's docket on October 16, 2009. Therefore, the ten-day period in which to file a notice of appeal of the Order expired on October 26, 2009. See Fed. R. Bankr. P. 8002(a). Kuntz did not file his Motion to Extend until after the expiration of such period on October 27, 2009. Accordingly, the Appeal is not valid and the District Court is precluded from reviewing the Order. Therefore, the Notice of Appeal should be stricken from the record of these cases or, alternatively, the Appeal should be dismissed.

II. The Court Should Give No Weight to Kuntz's Pro Se Status.

22. The fact that Kuntz is appearing *pro se* does not compel a different result. It is well-settled that *pro se* litigants must adhere to all rules of procedure, and, a lack of knowledge of such rules, although Kuntz could not prove one here, is not a defense. See *Green v. Dorrell*, 969 F.2d 915, 917 (10th Cir. 1992) (dismissal of complaint appropriate where *pro se* plaintiff failed to comply with local rules). Many Circuit Courts, including the Second Circuit, have recognized that “*pro se* litigants are not entitled to a general dispensation from the rules of procedure or court imposed deadlines.” *Jones v. Phipps*, 39 F.3d 158, 163 (7th Cir. 1994);

accord LoSacco v. City of Middletown, 71 F.3d 88, 92 (2d Cir. 1995). This rule applies with equal strength in the context of the timeliness of the filing of an appeal. *See, e.g., Campos v. LeFevre*, 825 F.2d 671, 675 (2d Cir. 1987) (adopting a strict position with respect to the timeliness of *pro se* appellant's appeal, notwithstanding that such rule may be "Draconian," especially "[a]s we deal more and more frequently with *pro se* appeals and laymen unfamiliar with the intricacies of federal civil procedure, let alone the rules of appellate practice"); *accord Poole v. Family Court of New Castle County*, 368 F.3d 263, 269 (3d Cir. 2004) (adopting stringent rule with respect to appeals despite recognition that it may lead to "harsh results" for *pro se* litigants); *In re Furst*, 206 B.R. 979, 981 (B.A.P. 10th Cir. 1997) (holding that *pro se* appellant was not relieved of its responsibility to follow rules setting out the deadline for filing a notice of appeal, as it is the risk the party assumes when it opts to proceed *pro se*); *In re Dow Corning Corp.*, 255 B.R. 445, 466 (E.D. Mich. 2000) (dismissing a number of untimely appeals, including several *pro se* appeals, and citing *Jourdan v. Jabe*, 951 F.2d 108, 110 (6th Cir. 1991), for proposition that "although a person proceeding *pro se* may not fully understand the rules or procedure, he or she is still required to comply with the rules. . . . [A] *pro se* status does not exempt a person from complying with the rules."); *In re Beiwel*, 2001 WL 753778, at *3 (dismissing appeal of *pro se* appellant who "was solely in control of the time for filing his notice of appeal and was not mislead or misinformed at any stage. It was his duty to inform himself of the appeal deadline . . .").

23. Moreover, as this Court well knows, Kuntz is no ordinary *pro se* litigant. The Debtors again direct the Court to a decision issued by the District Court over 15 years ago, in which the District Court found that

Kuntz's status as a *pro se* litigant is of little import. During his fourteen-year participation in the underlying Grant bankruptcy

proceedings, Kuntz has amassed litigation experience that would embarrass the majority of associates, and some partners, at large New York law firms. He has already filed no fewer than eight appeals, all unsuccessful, with six dismissed as either untimely or for failure to prosecute. I had to adjourn one conference in this action because Kuntz had an argument before the Second Circuit. Although I am unsure what significance to give to the ten years that Kuntz purportedly spent in law school, I find that his failure to comply with court rules, procedures, and deadlines is the result of conscious disregard, and not because of unfamiliarity with the courts. Throughout the proceedings, Kuntz has demonstrated a consistent pattern of vexatious litigation and little respect for the courts or other parties. The acts required of Kuntz were within his complete control and there was no acceptable reason for the delay.

Kuntz v. Pardo, 160 B.R. 35, 39 (S.D.N.Y. 1993). The court further stated that

Kuntz's dilatory conduct throughout his participation in the Grant case evinces bad faith. Apart from the lack of merit to his appeals, he has repeatedly failed to abide by the rules of the court and repeatedly fails to prosecute the appeals that he has filed. By contrast to cases holding that a party should not be penalized without considering the relative culpability of the appellant and his or her attorney, Kuntz has elected to appear *pro se* and thus the culpability is all his. There is no injustice manifest in allowing Kuntz to bear the brunt of his own neglect.

Kuntz v. Pardo, 160 B.R. at 39 (internal citations omitted). *See also In re Silicon Graphics, Inc.*

et al., Case No. 06-10977 (Bankr. S.D.N.Y. June 20, 2007) (Mem. Decision Denying Mot. of

William Kuntz III For An Order Reinstating His Proof of Claim, at 6) [Docket No. 877], *aff'd*,

Case No. 07-7698 (DAB) (S.D.N.Y. Sept. 29, 2008) [Docket No. 9] (finding that Kuntz's

"extensive legal experience, unlike many other pro se litigants, invokes little sympathy from this

Court . . ."); *In re Commercial Financial Services, Inc.*, 238 B.R. 479, 484 n.7 (Bankr. N.D.

Okla. 1999) (noting that Kuntz has considerable experience with federal law and his *pro se* status

is not something the court considered relevant).¹ In light of the foregoing, the Motion should be

¹ The court in *Commercial Financial* listed some of the published and unpublished decisions that Kuntz has been an active party:

granted and the untimely Notice of Appeal should be stricken from the record of these cases or, in the alternative, the Appeal should be dismissed.

Kuntz v. DASU LLC, (*In re Cray Computer Corp.*), 145 F.3d 1345 (Table) (10th Cir. 1998); *Kuntz v. Cray Computer Corp.* (*In re Cray Computer Corp.*), 107 F.3d 880 (Table) (10th Cir. 1997); *Kuntz v. Grand Union Co.* (*In re Grand Union Co.*), 106 F.3d 385 (Table) (3d Cir. 1996); *Kuntz v. Saul, Ewing, Remick & Saul*, 200 B.R. 101 (D. Del. 1996) (Kuntz sanctioned for pursuing a frivolous appeal, notwithstanding his *pro se* status, because of Kuntz's extensive appellate experience – listing failed federal and state appeals); *Kuntz v. Cray Computer Corp.* (*In re Cray Computer Corp.*), 97 F.3d 1464 (Table) (10th Cir. 1996); *Kuntz v. Nova Vista Industries, Inc.* (*In re Nova Vista Industries, Inc.*), 1992 WL 60395 (S.D.N.Y. 1992); *In re Adirondack Railway*, 1990 WL 124225 (N.D.N.Y. 1990); *Ehre v. State of New York* (*In re Adirondack Railway*), 93 B.R. 867 (N.D.N.Y. 1998); *In re W.T. Grant Co.*, 85 B.R. 250 (Bankr. S.D.N.Y. 1988), *aff'd in part, reversed in part*, 119 B.R. 898 (S.D.N.Y. 1990) (denial of Kuntz's request for fees and expenses); *In re One Westminster Co.*, 74 B.R. 37 (D. Del. 1987); *In re W.T. Grant Co.*, 4 B.R. 53 (Bankr. S.D.N.Y. 1980).

Kuntz brought an action in connection with the fate of The Peter Kuntz Company, a company apparently founded by his grandfather, against six banks, an investment firm, and John and Jane Does 1-299, alleging a conspiracy to dismantle the company. See *Kuntz v. Shawmut Bank of Boston*, 1987 WL 11172 (S.D.N.Y. 1987).

Kuntz also sued the New York State Senate, the New York State Board of Elections, various individuals, and numerous John and Jane Does, claiming constitutional violations in connection with Kuntz's attempt to run as an independent candidate for the United States House of Representatives in 1992. See *Kuntz v. New York State Board of Elections*, 924 F. Supp. 364 (N.D.N.Y. 1996); *Kuntz v. New York State Senate*, 113 F.3d 326 (2d Cir. 1997).

Kuntz has filed complaints against the New York Stock Exchange (motion for leave to appeal denied, 92 N.Y.2d 877 (1998)); the Board of Governors of the Federal Reserve, see 1997 WL 150062 (D.C. Cir. 1997); the City of Dayton, Ohio, see 99 F.3d 1139 (Table) (6th Cir. 1996); the Department of Energy (1995); and the United States Postal Service (1993). Kuntz has also been to Tax Court, although not *pro se*. See *Kuntz v. Commissioner*, 64 T.C.M 1258 (1992).

Further, Kuntz has unsuccessfully petitioned to the United States Supreme Court for writs of certiorari in numerous cases, including *Kuntz v. Fadness*, 519 U.S. 996 (1996); *Kuntz v. Shawmut Bank of Boston*, 501 U.S. 1252 (1991); *Kuntz v. Manley, Burke and Fischer, L.P.A.*, 500 U.S. 918 (1991); *Kuntz v. City of Dayton*, 499 U.S. 962 (1991); *Kuntz v. Society Bank, N.A.*, 498 U.S. 1089 (1991); *Kuntz v. Little Miami Railroad Co.*, 498 U.S. 1027 (1991); *Kuntz v. City of Dayton*, 488 U.S. 1008 (1989); *Kuntz v. Shawmut Bank of Boston*, 488 U.S. 952 (1988); *Kuntz v. Winters National Bank and Trust Co.*, 465 U.S. 1080 (1984).

Commercial Financial, 238 B.R. at 484 n.7.

III. Under Bankruptcy Rule 8002(c), Kuntz Cannot Show Excusable Neglect for Untimely Filing the Motion to Extend or the Notice of Appeal

24. While Kuntz has filed the Motion to Extend, he cannot show “excusable neglect” justifying his late filing of such Motion or his untimely filing of the Notice of Appeal. *See* Fed. R. Civ. P. 8002(c)(2). The burden of demonstrating “excusable neglect” rests on the party seeking the extension. *In re Hilliard*, 36 B.R. 80, 82 (S.D.N.Y. 1984).

25. In *Pioneer Investment Services Co. v. Brunswick Associates Limited Partnership*, the Supreme Court addressed the issue of “excusable neglect” in the context of Bankruptcy Rule 9006(b) and concluded that the decision whether a delay is justified by excusable neglect is “at bottom, an equitable one.” 507 U.S. 380, 395 (1993); *cf. In re Wechsler*, 246 B.R. at 492-93 (recognizing that the *Pioneer* factors “apply with equal force to [a determination under] Rule 8002(c)(2)”). The Supreme Court in *Pioneer* held that the determination of excusable neglect takes into account “all relevant circumstances surrounding the party’s omission,” including “the danger of prejudice to the debtor, the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith.” *Pioneer*, 507 U.S. at 395; *Wechsler*, 246 B.R. at 492. Courts generally have recognized that “[t]he four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import.” *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000); *In re Beiwel*, 2001 WL 753778, at *2 (same); *but see U.S. Lines, Inc. v. United States (In re McLean Indus., Inc.)*, 196 B.R. 670, 674 (S.D.N.Y. 1996) (noting that the “reason for the delay” factor “may be the pivotal factor, depending on the particular circumstances presented”) (emphasis in original). Although excusable neglect may justify “late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the

party's control," *Pioneer*, 507 U.S. at 388, "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect . . ." *Id.* at 392; *Weinstock v. Cleary, Gottlieb, Steen & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994); *Official Comm. of Unsecured Creditors of Investors & Lenders, Ltd. v. Field (In re Investors & Lenders, Ltd.)*, 169 B.R. 546, 551 (Bankr. D.N.J. 1994) (collecting cases). Kuntz manifestly cannot make the requisite showing of excusable neglect.

A. *The Reason for the Delay, Including Whether It was Within the Reasonable Control of the Movant*

26. As stated, this factor is the most significant consideration. See *In re McLean Indus.*, 196 B.R. at 674; *Lowry*, 211 F.3d at 463. Kuntz simply does not have a valid reason for his delay, which was entirely within his control. Moreover, courts have held that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." *Pioneer*, 507 U.S. at 392; *Weinstock*, 16 F.3d at 503; *In re Beiwel*, 2001 WL 753778, at *2-3 (concluding that *pro se* appellant failed to demonstrate excusable neglect where "he had the responsibility to ascertain the deadline for the appeal period," he was "solely in control of the time for filing his notice of appeal and was not mislead or misinformed at any stage," and "[i]t was his duty to inform himself of the appeal deadline").

27. *Pro se* appellants are not granted special dispensation from the requirements for filing an appeal or a motion to extend the time to file an appeal. See, e.g., *Campos*, 825 F.2d 674 (citing *Shah v. Hutto*, 722 F.2d 1167, 1168-69 (4th Cir. 1983) (en banc), for principle that filing requirements "[are] to be applied equally to *pro se* litigants and litigants represented by counsel" and adopting this position in accordance with the "en banc majority in *Shah* and the First, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits").

28. Kuntz, by filing the Motion to Extend, has demonstrated to this Court that he is not ignorant of the ten-day window in which a bankruptcy court order may be appealed. Moreover, Kuntz's filing of another motion to extend earlier in these cases, suggests that Kuntz is also aware of that such ten-day period also applies to the filing of a request to extend the time for filing a notice of appeal. *See* Motion to Extend Time to Appeal [Docket No. 1260].

29. Kuntz indicates in his Motion to Extend that he was unable to fully access the Debtors' claims agent's site to view the FairPoint Order until October 21, 2009 because "in Early Oct[ober] 2009 he "traveled to upstate [New York] where computer [a]ccess is quite limited." Motion to Extend, ¶5. Nevertheless, Kuntz not indicated why he was unable to access the Order for days after it was entered on the docket in these cases. Computers and internet, not to mention a wide range of telecommunication devices are available throughout the New York area, even "upstate." Additionally, the Objection is signed and dated as of September 29, 2009, indicating that Kuntz was well aware of the date of the hearing on the FairPoint Motion before he traveled to upstate New York. It was reasonable for Kuntz to expect that the FairPoint Order would be entered on the date of or soon after the hearing on the FairPoint Motion. It was Kuntz's responsibility to prepare himself for the possibility that the FairPoint Motion would be granted over the Objection and that he might wish to seek an appeal during such time. Kuntz's ability to access the FairPoint Order was fully in his control, and his failure to do so does not excuse his untimely filing of the Motion to Extend or the Notice of Appeal. Whether it was through inadvertence, ignorance or mistake, it was Kuntz's sole responsibility to timely file his Motion to Extend and Notice of Appeal, yet he failed to do so.

B. The Danger of Prejudice to the Debtor

30. The Debtors continue to be prejudiced by Kuntz's baseless motions, appeals, and objections. The Debtors are consistently forced to waste time, money and other resources to address the frivolous pleadings filed by Kuntz. Indeed, the Debtors' will be challenging yet another frivolous and procedurally improper appeal recently filed by Kuntz, an appeal of the order, dated September 17, 2009 [Docket No. 5215] denying Kuntz's motion under Rule 60 of the Federal Rules of Civil Procedure for relief from the order, dated October 16, 2008 [Docket No. 1094], denying Kuntz's motion for relief from the automatic stay. *See* Kuntz's Amended Notice of Appeal, dated September 29, 2009 [Docket No. 5307].

C. The Length of the Delay and its Potential Impact on Judicial Proceedings

31. While the length of the delay was not protracted, Kuntz, being fully cognizant of the Court's ruling, had no reason to delay the filing of his Motion to Extend or his Notice of Appeal.

D. Whether the Movant Acted in Good Faith

32. At this point in the chapter 11 cases, it is clear that Kuntz is no longer acting in good faith. Although he is fully aware of the rules and procedures of this Court, Kuntz continually chooses to disregard them.

33. Given the foregoing application of the *Pioneer* factors, Kuntz has failed to demonstrate excusable neglect. Accordingly, (i) the Motion to Extend must be denied, and (ii) the Notice of Appeal should be stricken or from the record, or, in the alternative, the Appeal must be dismissed.

Notice

34. No trustee has been appointed in these chapter 11 cases. The Debtors have served notice of this Motion in accordance with the procedures set forth in the amended

order entered on February 13, 2009 governing case management and administrative procedures for these cases [Docket No. 2837] on (i) the U.S. Trustee; (ii) the attorneys for the Creditors' Committee; (iii) the Securities and Exchange Commission; (iv) the Internal Revenue Service; (v) the United States Attorney for the Southern District of New York; (vi) Kuntz; and (vii) all parties who have requested notice in these chapter 11 cases. The Debtors submit that no other or further notice need be provided.

35. No previous request for the relief sought herein has been made by the Debtors to this or any other court.

WHEREFORE the Debtors respectfully request that the Court grant the relief requested herein and such other and further relief as it deems just and proper.

Dated: December 16, 2009
New York, New York

/s/Jacqueline Marcus
Jacqueline Marcus

WEIL, GOTSHAL & MANGES LLP
767 Fifth Avenue
New York, New York 10153
Telephone: (212) 310-8000
Facsimile: (212) 310-8007

Attorneys for Debtors
and Debtors in Possession

Exhibit A

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555-jmp

- - - - -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS INC.,

Debtors.

- - - - -x

United States Bankruptcy Court

One Bowling Green

New York, New York

October 7, 2009

10:24 AM

B E F O R E:

HON. JAMES M. PECK

U.S. BANKRUPTCY JUDGE

Hearing re: Motion Filed by Lehman Commercial Paper Inc. for
Authority to Consummate Transactions Contemplated in the
Chapter 11 Plan Proposed by the Lehman Lenders in the SunCal
Chapter 11 Cases

Transcribed by: Hana Copperman

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A P P E A R A N C E S :

WEIL, GOTSHAL & MANGES LLP

Attorneys for Debtors

767 Fifth Avenue

New York, NY 10153

BY: GARRETT AVERY FAIL, ESQ.

MICHAEL W. BOND, ESQ.

MILBANK, TWEED, HADLEY & MCCLOY LLP

Attorneys for the Official Committee of Unsecured
Creditors

One Chase Manhattan Plaza

New York, NY 10005

BY: DENNIS C. O'DONNELL, JR.

Also Present:

MR. MATT HIGBEE

(TELEPHONICALLY),

Party Pro Se

P R O C E E D I N G S

MR. FAIL: Good morning, Your Honor. Garrett Fail, Weil, Gotshal & Manges, for Lehman Brothers Holdings Inc. and its debtor and certain non-debtor affiliates.

On the agenda this morning is one item. It's a motion of Lehman Commercial Paper Inc. for authority to consummate transactions contemplated by LCPI and certain of its non-debtor affiliates in the Chapter 11 plan filed in the SunCal Chapter 11 cases. The debtors believe, in their business judgment, that proposing a Chapter 11 plan in the SunCal cases will increase the prospect for recovery on Lehman's interests in approximately 2 billion dollars of loans made to SunCal, the SunCal debtors.

The debtors have worked with the unsecured creditors' committee in these cases and proposed a plan that is a product of months of work in connection with the SunCal cases. Only one objection was filed to the debtors' motion, and that was by Mr. William Kuntz, III. The objection mentions SunCal and another unrelated transaction that has been proposed by the debtors recently, but it does not address the substance of the debtors' motion, the present motion, or the next motion to be heard later this month by Your Honor, and it doesn't provide any support for the Court to overrule the debtors' business judgment or the facts represented in the debtors' motion.

The Court is likely familiar with Mr. Kuntz from his

1 past appearances and submissions before this Court, and because
2 Mr. Kuntz's objection addresses another transaction, the
3 Fairpoint transaction, may hear from him again at the hearing
4 next week on the 14th.

5 Late last night our offices received a fax from Mr.
6 Kuntz asking us to convey his respects to Your Honor and accept
7 his papers on his submission. We're told he will not be
8 appearing this morning. I provided a copy of that fax to your
9 courtroom deputy this morning.

10 THE COURT: I've been given a copy and I've read it.

11 MR. FAIL: Okay, Your Honor. The debtors request that
12 the Court deny the objection and approve the motion and the
13 relief requested therein.

14 Your Honor, I would point out that the proposed order
15 we provided and that the debtors' submitted provides that the
16 proposed plan that was attached to the motion may be modified,
17 amended or supplemented by the proponents thereof without
18 further order of the Court. And that is consistent with
19 Chapter 11 processes where plans evolve over time. The
20 disclosure statement hearing for both the debtors' proposed
21 plan in the SunCal cases and LCPI's and the Lehman proposed
22 plan is scheduled for next week in the California Bankruptcy
23 Court, and the debtors anticipate, these debtors, the Lehman
24 debtors, anticipate making amendments to that plan that it's
25 proposing in the SunCal cases. The proposed order that we've

1 submitted provides that any agreements related to the proposed
2 plan may be modified, amended, supplemented, provided that in
3 each case any such modification, amendment or supplement does
4 not have a material adverse affect on LCPI's estate. The
5 amendments under contemplation, we believe, fall within this
6 and do not present a material adverse effect on LCPI's estate,
7 but for the record I'd like to share with you where we think
8 the proposed amendment is heading.

9 The one relevant one is that subject to certain
10 limitations the Lehman entities, which include LCPI but also
11 non-debtor affiliates, will be guaranteeing a minimum payment
12 to creditors in connection with an equitable subordination
13 claims (sic) made in an adversary proceedings (sic) brought in
14 the SunCal debtor cases of up to 10 million dollars.

15 THE COURT: May I stop you for one second, Mr. Fail?
16 There must be someone on CourtCall with an open mike rustling
17 papers, because the sound is being heard throughout the
18 courtroom, and I would just ask whoever that is to please mute
19 your phone. Sounds like that worked. I'm sorry for the
20 interruption.

21 MR. FAIL: No problem, Your Honor. Thank you. As I
22 was saying, the Lehman entities will together guarantee a
23 maximum payment of 10 million dollars, but that will be offset
24 by its settlement -- amounts paid in settlement, and it will be
25 further offset by amounts actually paid as a result of

1 litigation. In addition, as I just mentioned, that will be
2 shared by LCPI and its non-debtor affiliates. So, in total, we
3 don't believe that there will be any material adverse effect on
4 LCPI's estate, and in the debtors' business judgment this is
5 still the best way to maximize recoveries from the SunCal
6 debtors.

7 Your Honor, with that said we appreciate the Court
8 scheduling a hearing this morning in advance of the disclosure
9 statement hearings in the SunCal cases next week. I'm
10 available to answer any questions that you may have regarding
11 the motion, and I have with me Michael Bond, a partner at Weil,
12 Gotshal's real estate department, who's been working on these
13 matters for the past year.

14 THE COURT: Okay. I have a couple of questions. The
15 first is really for the creditors' committee, who's here and
16 represented, to confirm that the committee has been consulted
17 in connection with this unusual procedure in which, in effect,
18 one bankruptcy case is controlling another bankruptcy case, and
19 money is being used in order to minimize possible litigation
20 risk in that other bankruptcy case.

21 MR. O'DONNELL: Yes, Your Honor. Dennis O'Donnell,
22 Milbank, Tweed, Hadley & McCloy, on behalf of the creditors'
23 committee. We have been involved in the process with respect
24 to this motion and have been monitoring closely developments in
25 the SunCal case in California. People in our LA office follow

1 that routinely. And we do believe that the proposed authority
2 here to file and prosecute this plan makes sense in the context
3 of where that case is currently, and this is obviously a
4 competing plan. There's a process that lies ahead of us, and
5 we believe that the debtors need to do this in order to
6 ultimately maximize value. We don't know whether the plan
7 that's being proposed now will, in fact, be the plan at the end
8 of the day, and we somehow doubt that it will be, but we
9 believe that as part of the overall process the debtors need to
10 take these steps.

11 In that connection, the order does provide that the
12 debtor should be able to amend or modify the plan as necessary
13 as the process unfolds, but our understanding with the debtors
14 is that they will, you know, such amendments will be made in
15 consultation with the committee and with the committee's
16 approval. And on that understanding the proposed relief is
17 acceptable to the committee.

18 THE COURT: Well, and I appreciate that, and this is,
19 I guess, my second question, which is really for Mr. Fail. Is
20 there any limit upon the amendments that can be made to this
21 proposed plan? I mean, at the moment it calls for the use of
22 15 million dollars, potentially, as a fund to settle equitable
23 subordination type claims in the California bankruptcy cases.
24 But let's just say, for the sake of discussion, it turns out to
25 be 30 million dollars. Is there some materiality component

1 here that would call for further approval of the use of funds
2 at what might be 200 percent of the current level? I'm just
3 wondering if this is a blank check or if this is simply
4 authority to proceed with a competing plan along the lines
5 outlined in the motion, but if there are material changes there
6 would be a need to come back here.

7 MR. FAIL: Your Honor, the language proposed in this
8 order does contemplate that it has to be a material adverse
9 effect on LCPI's estate. That language is consistent with
10 language that's been inserted in other orders in these cases
11 where the transaction documents haven't been finalized or where
12 they've been finalized but amendments have been contemplated.
13 This material adverse threshold is not as defined as a specific
14 dollar amount would be, but in working in consultation with the
15 committee we believe that sufficient checks on the debtors'
16 assessment of material adverse effects are in place, and
17 although Your Honor is correct that if there is a 15 million
18 dollar component, and I just mentioned a 10 million, that will
19 be offset by other factors. It's difficult at this time to say
20 what the end results of negotiations in the SunCal cases will
21 lead to and the final result of these plans in terms of dollar
22 amount or other structures. So we needed to move forward to
23 get the authority to have the flexibility to negotiate in those
24 cases. The alternative, Your Honor, we believe, would be
25 materially adverse for the debtors' estates in that they

1 wouldn't be able to propose a plan or wouldn't have the
2 flexibility to prosecute it. And that's why we --

3 THE COURT: I understand the need for flexibility, and
4 I appreciate the fact that the creditors' committee will be
5 consulted throughout the process of attempting to confirm this
6 competing plan in the California court. I also recognize that
7 it would be completely unworkable for you to have to come back
8 here on a repeated basis to obtain authority to the extent
9 there are major changes in the proposed competing plan.

10 The concern that I have is as much as anything a
11 notice concern in respect of the present motion. The present
12 motion speaks in terms of a particular kind of competing plan,
13 with funds being used at a notional level of perhaps 15 million
14 dollars. But it's obvious that in a free-form negotiation in
15 which you have no lockups with any of the constituents in the
16 California case that that may be the starting point, as opposed
17 to the ending point, of a negotiated adjustment to that plan
18 treatment.

19 I don't in any way seek to become involved in that
20 process, but to the extent that it ends up with the use of
21 proceeds from the estate at a level which is materially greater
22 than the amount suggested in the current motion it seems to me
23 there should be at least some notice given to creditors in the
24 Lehman cases that pursuant to the authority granted in this
25 motion instead of using 15 million dollars in estate funds

1 you're using some number greater than that. Or if it turns out
2 that there's a totally different kind of plan that may involve
3 no use of funds or the assumption of some assumed liability
4 going down the road in that case because of ongoing litigation,
5 I think there should be notice of that as well. I don't think
6 it should be a black hole.

7 MR. FAIL: Your Honor, could I have one moment just to
8 consult with my colleagues?

9 THE COURT: Sure.

10 (Pause)

11 MR. FAIL: Thank you very much, Your Honor. Having
12 consulted with Mr. O'Donnell for the committee and Mike Bond
13 from Weil, Gotshal for the debtors I would make this proposal
14 and response to Your Honor's suggestion.

15 That any material modifications will be done in
16 consultation with, or after consultation with, the creditors'
17 committee, and that material amendments to the plans, as
18 they're filed in the California cases, will be filed with a
19 notice in these cases on ECF and served by the debtors on the
20 master service list.

21 THE COURT: That's fine, so long as we're just dealing
22 with material modifications. I don't want the docket in this
23 case to be burdened with excessive confusing filings relating
24 to the SunCal case. The idea is to just clearly notify parties
25 in interest if there has been a use of materially more money in

1 the context of the SunCal resolution than had been noticed in
2 the current motion.

3 MR. FAIL: Thank you, Your Honor. And we will
4 endeavor to do our best to minimize the filings and the
5 decision on whether or not its material will be made in
6 consultation with the creditors' committee.

7 THE COURT: Now, and let me comment briefly on the
8 objection to this motion which has been filed by William Kuntz.
9 I read Mr. Kuntz's objection, and it appears to relate to two
10 transactions, both the SunCal and the Fairpoint matters. Only
11 the SunCal matter is before me today. I also received, by hand
12 delivery this morning, a letter from Mr. Kuntz, dated October
13 6th, noting his inability to attend today's hearing and the
14 fact that he is relying on his papers.

15 I have reviewed the papers filed by Mr. Kuntz and note
16 that there are a number of attachments relating to news stories
17 that have appeared in California relating to the SunCal
18 bankruptcy cases, as well as a Bloomberg article. The
19 objection questions the business judgment of Lehman in
20 expending funds associated with the SunCal bankruptcy cases but
21 does not provide reasoning in support of the objection.
22 Instead, the objection appears to challenge aspects of Lehman's
23 current business decision process through Alvarez & Marsal,
24 claims some connection between Weil, Gotshal and Alvarez &
25 Marsal, argues that there has been a breach of a trust

1 relationship having to do with the Grand Union bankruptcy case
2 and various funds relating to that bankruptcy case that may or
3 may not currently be held by the New York State Comptroller's
4 Office.

5 Based upon my review of the objection it appears that
6 Mr. Kuntz is repeating various arguments made in the context of
7 an earlier motion for relief from the automatic stay which I
8 denied last November, and Mr. Kuntz's objection does not appear
9 to go to the particulars of the SunCal bankruptcy and the risks
10 in terms of expense and delay associated with that bankruptcy
11 case to the Lehman estate.

12 Under the circumstances I find that the objections
13 made by Mr. Kuntz are not relevant to the matter before the
14 Court, and I overrule those objections. I do so, however,
15 without prejudice to Mr. Kuntz's proof of claim which appears
16 to have been filed in the bankruptcy cases, and Mr. Kuntz is
17 free to pursue such further objections as he considers
18 appropriate and in his interest. He is also free to prosecute
19 his proof of claim, as are all the creditors.

20 So the Kuntz objection is overruled. There are no
21 other objections to the relief being requested here, and
22 subject to the modifications that have been put on the record
23 regarding notice of material modifications that may be made to
24 the plan over time, I grant the motion.

25 MR. FAIL: Thank you very much, Your Honor. I could

1 either hand up the order as proposed and we could rest on the
2 record for the rest, or we could amend the order to provide --

3 THE COURT: I suggest that the order be amended in a
4 manner that's acceptable to the creditors' committee and that
5 it be submitted following amendment.

6 MR. FAIL: We'll submit it later this afternoon.

7 Thank you very much, Your Honor.

8 THE COURT: Okay. We're adjourned.

9 (Proceedings concluded at 10:44 AM)

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I N D E X

RULINGS

	Page	Line
Granting of Motion Filed	13	24
by Lehman Commercial		
Paper Inc. for Authority		
to Consummate Transactions		
Contemplated in the		
Chapter 11 Plan Proposed		
by the Lehman Lenders in		
the SunCal Chapter 11		
Cases		

C E R T I F I C A T I O N

I, Hana Copperman, certify that the foregoing transcript is a
true and accurate record of the proceedings.

HANA COPPERMAN

AAERT Certified Electronic Transcriber (CET**D-487)

Veritext LLC

200 Old Country Road

Suite 580

Mineola, NY 11501

Date: October 8, 2009

Exhibit B

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 08-13555(JMP)

Case No. 08-01420(JMP)(SIPA)

Adv. Case No. 08-01751

Adv. Case No. 08-01743

Adv. Case No. 09-01054

Adv. Case No. 09-01455

Adv. Case No. 09-01258

- - - - -x

In the Matter of:

LEHMAN BROTHERS HOLDINGS, INC., et al.,

Debtors.

- - - - -x

In the Matter of:

LEHMAN BROTHERS INC.,

Debtor.

- - - - -x

ALIANAT BANK,

Plaintiff,

-against-

LEHMAN BROTHERS SPECIAL FINANCING, et al.,

Defendants.

- - - - -x

VERITEXT REPORTING COMPANY

1 - - - - -x
2 STATE STREET BANK AND TRUST COMPANY,
3 Plaintiff,
4 -against-
5 LEHMAN COMMERCIAL PAPER INC.,
6 Defendant.
7 - - - - -x
8 HANK'S LIVING TRUST,
9 Plaintiff,
10 -against-
11 LEHMAN BROTHERS OTC DERIVATIVES AND LBHI,
12 Defendants.
13 - - - - -x
14 BOARD OF EDUCATION, CITY OF CHICAGO,
15 Plaintiff,
16 -against-
17 LEHMAN BROTHERS SPECIAL FINANCING,
18 Defendant.
19 - - - - -x
20 NEUBERGER BERMAN,
21 Plaintiff,
22 -against-
23 PNC BANK, NA, et al.,
24 Defendants.
25 - - - - -x

1 U.S. Bankruptcy Court
2 One Bowling Green
3 New York, New York
4

5 October 14, 2009
6 10:04 AM
7

8 B E F O R E:

9 HON. JAMES M. PECK

10 U.S. BANKRUPTCY JUDGE
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1 As a result of these rulings, there's no basis for
2 finding Shinsei in contempt. And I will entertain an order
3 denying the motion.

4 MR. KRASNOW: Thank you, Your Honor. With the Court's
5 permission, may I be excused for the balance of the hearing?
6 This is Richard Krasnow.

7 THE COURT: Yes. You're excused.

8 And Shinsei's counsel is excused as well.

9 MR. KLEINER: Thank you.

10 MR. TROST: Thank you.

11 MS. MARCUS: Your Honor, Jacqueline Marcus again for
12 LBHI. The next item on the agenda is number 6, the motion of
13 Lehman Commercial Paper Inc. for authorization to purchase the
14 FairPoint participation. Your Honor, this is a motion by LCPI
15 for authorization to purchase from the VFT (ph.) 2008 Trust a
16 participation in Term Loan A issued by FairPoint
17 Communications.

18 This motion arises out of a settlement with
19 Metropolitan Life Insurance Company which was approved by the
20 Court on May 13th. Under the terms of the MetLife settlement,
21 if LCPI and MetLife cannot agree as to whether a particular
22 loan should be sold by the trust, and if the outlook of Moody's
23 and Standard & Poor's with respect to that debt is negative,
24 then MetLife can compel a sale of the loan at the prevailing
25 market rate.

1 MetLife has requested that LCPI sell the VFT 2008's
2 interest in the FairPoint loan. Because LCPI believes that the
3 market is undervaluing the FairPoint loan, LCPI would like to
4 purchase the FairPoint participation from VFT 2008.

5 Your Honor, there have been a couple of pleadings
6 filed in response to the motion. The ad hoc group of Lehman
7 Brothers creditors has filed a statement in support of the
8 motion. And we have received one objection; it was filed by
9 William Kuntz III as part of his objection to the SunCal
10 motion. I don't know if Mr. Kuntz is present in court today or
11 by phone.

12 THE COURT: Let me find out.

13 Is Mr. Kuntz present on the phone or in court?

14 Apparently not.

15 MS. MARCUS: I'll just address his objection very
16 briefly, Your Honor. It appears Mr. Kuntz questions the
17 debtors' business judgment underlying the motion.

18 THE COURT: If I could just interject. There was a
19 separate hearing that took place in connection with the SunCal
20 matter; I think it was last week.

21 MS. MARCUS: It was.

22 THE COURT: And Mr. Kuntz submitted a letter just
23 before the start of that hearing, which was delivered to
24 chambers, indicating that he was going to rely on his papers
25 and not appear in person to press his objection in the SunCal

1 matter, which is an entirely different issue. For those who
2 weren't present, that was a separate motion brought by Lehman
3 Brothers to file a competing plan in the Central District of
4 California relating to the bankruptcy of SunCal. Mr. Kuntz
5 filed a single objection in writing, which related both to the
6 matter which is now being heard and the SunCal matter.

7 I placed on the record during the course of the SunCal
8 hearing a disposition of his objection, and I am prepared to
9 incorporate that disposition into the record today, after
10 you've completed your remarks, so I don't have to repeat it.

11 MS. MARCUS: Okay, thank you, Your Honor. Mr. Kuntz
12 questions the debtors' business judgment underlying the motion.
13 And I failed to mention that the creditors' committee, which is
14 here today, supports the motion. So we have both the
15 creditors' committee and the ad hoc group supporting the
16 debtors' business judgment here. I think that speaks volumes
17 for the appropriateness of the debtors' business judgment.

18 Notwithstanding that, we have present in court today
19 Mr. Frank Turner who is in charge of LCPI's commercial and
20 industrial loan portfolio. And in support of the motion, I am
21 prepared to proffer Mr. Turner's testimony; I think I'll wait
22 on that decision until I hear what the Court's disposition of
23 the SunCal hearing was.

24 THE COURT: I'm surprised you don't talk to everybody
25 at your office.

1 MS. MARCUS: We try, Your Honor.

2 THE COURT: It was simply a denial of Mr. Kuntz's
3 objection for a variety of reasons that related to SunCal but,
4 I believe, are also applicable to the matter before the Court.
5 The Kuntz objection did not speak to the specifics of SunCal,
6 nor does it speak to the specifics of the pending motion.
7 Rather, it repeats and reiterates positions previously
8 expressed by Mr. Kuntz in connection with his concerns about
9 the disposition of funds associated with the Grand Union
10 bankruptcy from a number of years ago.

11 I found in my comments, which will speak for
12 themselves, that Mr. Kuntz's objections did not in fact go to
13 the merits of the SunCal competing plan, nor did it go to the
14 merits of what's presently before me. And so I denied the
15 motions as, in effect, being inapposite -- excuse me, the
16 objection as being inapposite to the motion. That's what I
17 did.

18 MS. MARCUS: Okay. Thank you, Your Honor.

19 THE COURT: But what I actually did will speak for
20 itself on the record --

21 MS. MARCUS: Okay.

22 THE COURT: -- because I don't remember word for word.

23 MS. MARCUS: I know Mr. Fleck wants to speak on behalf
24 of the committee, and maybe I'll withhold my decision as to
25 whether we proffer the testimony until he's through, if that's

1 okay.

2 THE COURT: Okay.

3 MR. FLECK: Good morning, Your Honor. Evan Fleck of
4 Milbank, Tweed, Hadley & McCloy, on behalf of the official
5 committee of unsecured creditors. As Ms. Marcus stated, the
6 committee does support the relief requested in the motion, but
7 we do view it as an important matter and something the
8 committee would like to address the Court briefly on just for a
9 few points.

10 Your Honor, it's important, from the committee's
11 perspective and in considering this motion, what the debtors
12 are not seeking here. The debtors are not seeking approval to
13 make an open-market purchase of FairPoint notes. We think we
14 that's a very different motion; it's asking for a different
15 level of business judgment and authority, and that's not what
16 was requested here. Instead, it's a preservation of an
17 interest that the debtors have in the securitization trust.
18 Nevertheless, the committee spent considerable time considering
19 the relief, the business judgment and the merits of the
20 proposed transaction; had separate meetings, in fact, with Mr.
21 Turner to talk about the particular credit here and whether it
22 was appropriate -- an appropriate expenditure of estate
23 resources.

24 We do have a protocol, as the Court is aware, for
25 considering these transactions. We think, given the nature of

1 the transaction, it was appropriate to come before the Court,
2 and we respectfully disagree with the debtors' view that this
3 is an ordinary-course transaction. Notwithstanding that, it's
4 not an open-market purchase. It is a significant expenditure
5 of estate resources. Even though it's to preserve an asset, it
6 should be vetted before the Court. And we're pleased to see
7 that other creditors have also -- we spent time with them, they
8 read the motion and there also was a statement, as Ms. Marcus
9 stated, on behalf of one group of creditors in the case.

10 Your Honor, for the reasons that were set forth in the
11 debtors' motion, and based upon the committee's considered
12 judgment of the relief requested, we do support the relief and
13 the proposed transaction.

14 THE COURT: Okay, thank you.

15 MR. FLECK: Thank you.

16 MS. MARCUS: Your Honor, upon further reflection,
17 unless you want to hear the proffer, I think we'll defer with
18 the proffer and save the Court and everyone else some time.

19 THE COURT: I don't feel a need to hear the proffer
20 based upon my review of the papers and the supporting statement
21 just given by the creditors' committee, but it's entirely up to
22 you.

23 MS. MARCUS: Okay. Thank you, Your Honor. Based on
24 that, the debtors request that you approve the relief requested
25 in the FairPoint motion.

1 THE COURT: I approve the relief and I overrule the
2 objections, to the extent applicable, filed by Mr. Kuntz.

3 MS. MARCUS: Thank you, Your Honor. The next matter
4 will be handled by my partner Mr. Lemons.

5 MR. LEMONS: Good morning, Your Honor. Robert Lemons
6 from Weil, Gotshal & Manges, on behalf of the debtors. Your
7 Honor, I'm here to present a fourth supplemental order,
8 pursuant to Sections 105 and 365 of the Bankruptcy Code, to
9 establish procedures for the settlement or assumption and
10 assignment of pre-petition derivative contracts.

11 This order, Your Honor, would supplement the order
12 that you entered on December 16th, 2008, the established
13 procedures, both for the assumption and assignment of
14 derivative contracts and for the termination -- or the entry by
15 the debtors of termination and settlement agreements with
16 respect to derivative contracts.

17 As Your Honor may recall, originally there were
18 several contracts that were carved out of that December 16th
19 order so that neither the assumption and assignment procedures,
20 nor the termination and settlement procedures, were applicable.
21 The contracts that were carved out were contracts subject to
22 objections of certain parties that had been lodged to our
23 original motion.

24 The debtors have discovered since then that there have
25 been a number of instances where one of the objecting parties

Exhibit C

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

-----		X
In re:	:	
	:	Chapter 11
	:	
LORAL SPACE &	:	Lead Case No. 03-41710 (RDD)
COMMUNICATIONS LTD., ET AL.,	:	03-41709 (RDD) through
	:	03-41728 (RDD)
	:	
Reorganized Debtors.	:	
	:	Jointly Administered
-----		X
PHIL IVALDY,	:	
	:	
Appellant,	:	
v.	:	
	:	
LORAL SPACE &	:	
COMMUNICATIONS LTD., ET AL.,	:	
	:	
Reorganized Debtors-Appellees.	:	
-----		X

**ORDER DISMISSING PHIL IVALDY'S APPEAL OF ORDER GRANTING
APPLICATION FOR FINAL DECREE AND CLOSING OF THIS CHAPTER 11 CASE**

Upon the Motion dated May 18, 2009 (the "Motion"), of Loral Space & Communications Ltd. and its affiliated reorganized debtors (collectively, the "Debtors" and, as reorganized, the "Reorganized Debtors") to (I) Enforce the Order Confirming the Debtors' Fourth Amended Joint Plan of Reorganization, as Modified, (II) Dismiss Phil Ivaldy's Appeal of Order Granting Application for Final Decree and Closing of this Chapter 11 Case and, in the Alternative, (III) Strike Certain Items from Phil Ivaldy's Designation of Record on Appeal; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the Standing Order M-61 Referring to Bankruptcy Judges for the Southern District of New York Any and All Proceedings Under Title 11, dated July 10, 1984 (Ward, Acting, C.J.); and consideration of the Motion and the relief

requested therein being a core proceeding pursuant to 28 U.S.C. § 157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion having been provided to (i) Phil Ivaldy, (ii) the United States Trustee for the Southern District of New York, (iii) the attorneys for the agent for the Debtors' prepetition secured lenders, (iv) the attorneys for the statutory committee of unsecured creditors appointed in these chapter 11 cases, (v) the attorneys for the official committee of equity security holders appointed in these chapter 11 cases and (vi) those parties entitled to notice pursuant to this Court's Order dated July 15, 2003 establishing notice procedures in these chapter 11 cases; and it appearing that no other or further notice need be provided; and the Court having conducted a hearing (the "Hearing") on the Motion on June 16, 2009; and based upon the record of the Hearing; and upon (i) the Motion, (ii) the Reorganized Debtors-Appellees' Counter-Designation of Items to be Included in Record on Appeal (the "Counter-Designation"); (iii) Appellant's Objections to the Reorganized Debtor-Appellees' Motion (the "Objection"), (iv) the Reply of the Reorganized Debtors to the Objection, (v) Appellant's Motion for Extension of Time to File Responses to the Reorganized Debtors-Appellees' Counter-Designation and Motion, and (vi) Appellant's Opposition to Application of Section 350(a) of the Bankruptcy Code and Bankruptcy Rule 3022 for Final Decree Closing Chapter 11 Case of Loral Space & Communications Ltd.; and the Court having determined that the legal and factual bases set forth in the Motion and at the Hearing establish just cause for the relief granted herein; and upon all of the proceedings had before the Court; and after due deliberation and sufficient cause appearing therefore for the reasons stated by the Court at the conclusion of the Hearing, **THE COURT HEREBY FINDS, DETERMINES AND CONCLUDES THAT:**

- A. The Appeal was filed after the expiration of the period set forth in Rule 8002(a) of the Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”).
- B. Phil Ivaldy did not make any request to enlarge the period set forth in the Bankruptcy Rule 8002(a) in accordance with Bankruptcy Rule 8002(c).
- C. Phil Ivaldy neither claimed nor offered any facts to support any claim of excusable neglect with respect to the filing of the Appeal.

FOR ALL OF THE FOREGOING AND AFTER DUE DELIBERATION THE COURT

ORDERS THAT:

- 1. The Motion is hereby granted as provided herein.
- 2. The Appeal is dismissed, with prejudice.
- 3. The requirement under Rule 9013-1(b) of the Local Bankruptcy Rules for the Southern District of New York for the filing of a memorandum of law hereby is waived.

Dated: June 18, 2009
New York, New York

/s/Robert D. Drain
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
One Bowling Green
New York, NY 10004-1408**

IN RE: Loral Space & Communications Ltd. and Space CASE NO.: 03-41710-rdd
Systems/Loral, Inc. ("SS/L")

Social Security/Taxpayer ID/Employer ID/Other Nos.: CHAPTER: 11
13-3867424

NOTICE OF DISMISSAL

An order of dismissal was entered by the Honorable Robert D. Drain in this Chapter 11 case.

Loral Space & Communications Ltd. was dismissed from the case on June 18, 2009 WITH PREJUDICE.

Dated: June 18, 2009

Vito Genna
Clerk of the Court

Notice Recipients

District/Off: 0208-1

User: mgist

Date Created: 6/18/2009

Case: 03-41710-rdd

Form ID: 131

Total: 97

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74103 Attn.: Amy Callard, Esq., Mail Drop 15-L

TOTAL: 90

Exhibit D

UNITED STATES BANKRUPTCY COURT

SOUTHERN DISTRICT OF NEW YORK

Case No. 03-41710

- - - - -x

In the Matter of:

LORAL SPACE & COMMUNICATIONS LTD., ET AL.,

Debtors.

- - - - -x

U.S. Bankruptcy Court

One Bowling Green

New York, New York

June 16, 2009

12:42 p.m.

B E F O R E:

HON. ROBERT D. DRAIN

U.S. BANKRUPTCY JUDGE

MOTION of Reorganized Debtors to (I) Enforce the Order
Confirming the Debtors Fourth Amended Join Plan, (II) Dismiss
Phil Ivaldy's Appeal of Order Granting Application for Final
Decree and Closing of this Chapter 11 Case.

Transcribed By: Esther Accardi

1 A P P E A R A N C E S :

2 WEIL GOTSHAL & MANGES, LLP

3 Attorneys for Debtors

4 767 Fifth Avenue

5 New York, New York 10153

6

7 BY: SHAI Y. WAISMAN, ESQ.

8

9

10 PHIL IVALDY

11 Appearing Pro Se

12 (Telephonically)

13

14

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1 P R O C E E D I N G S

2 THE COURT: Loral.

3 MR. WAISMAN: Good afternoon, Your Honor.

4 THE COURT: Good afternoon.

5 MR. WAISMAN: Shai Waisman, Weil Gotshal & Manges on
6 behalf of the reorganized Loral debtors.

7 Your Honor, we're here on the debtors' motion to
8 enforce the confirmation order, dismiss an appeal, or in the
9 alternative, to strike designation of record.

10 This relates to the notice of appeal served and filed
11 by Mr. Ivaldy. I'm not sure if Mr. Ivaldy is present or
12 participating on the phone.

13 THE COURT: Are you on the phone, Mr. Ivaldy?

14 MR. IVALDY: I'm here.

15 THE COURT: Okay.

16 MR. WAISMAN: Your Honor, unfortunately, the Court is
17 probably all too familiar with the background of this matter.
18 I won't belabor the record as it's been a long morning.

19 In summary, Mr. Ivaldy -- Your Honor issued a final
20 decree closing the lead case in this matter on April 15, 2009.
21 And that order was entered on the docket of the cases on
22 April 15, 2009.

23 Mr. Ivaldy did not file his notice of appeal until
24 thirteen days later, April 28, 2009. Manifestly, he has not
25 complied with Bankruptcy Rule 8002. The appeal is late and the

1 Bankruptcy Court retains the jurisdiction to dismiss the appeal
2 for being untimely.

3 In the alternative, Your Honor, if one were to read
4 the notice of appeal and the subsequent responses filed by Mr.
5 Ivaldy, they make clear they have nothing to do, whatsoever,
6 with Your Honor's order entering a final decree in these cases.
7 Rather, Mr. Ivaldy would like to reargue or collaterally attack
8 Your Honor's confirmation order which is now years old. And
9 which Mr. Ivaldy objected to in the original proceeding lost,
10 took an appeal from that to the District Court as well as the
11 Second Circuit. Denied by both courts and petitioned to be
12 heard by the Supreme Court, and that, too, was denied.

13 As such, the confirmation order is final, non-
14 appealable and the collateral attack is, in fact, a violation
15 of the final confirmation order, itself. And Your Honor should
16 enforce the confirmation order and dismiss the appeal on those
17 grounds.

18 Finally, if Your Honor were to entertain or otherwise
19 believe that the appeal were timely, for the reasons stated in
20 our papers, and I don't have to go on, we would ask that the
21 designation of the record be stricken as requested, as none of
22 the documents Mr. Ivaldy seeks to rely on in his appeal, were
23 submitted in connection with Your Honor's consideration of the
24 final decree, and, therefore, do not constitute part of the
25 record.

1 Unless Your Honor has any questions, those are the
2 simple facts before the Court.

3 THE COURT: Okay.

4 (Pause)

5 THE COURT: All right. Mr. Ivaldy, do you have
6 anything beyond what you submitted?

7 MR. IVALDY: I'd like to go through item-by-item.

8 One of the statements that had just been made, I guess
9 the first issue would be whether or not my appeal is timely.
10 Does the Court have any problems with my appeal?

11 THE COURT: Yes. I believe it is -- based on what I
12 see as to the facts, the appeal is untimely.

13 MR. IVALDY: I worked with the Court and submitted the
14 appeal. Was informed that the appeal was submitted in a timely
15 fashion. And the Clerk had not docketed the appeal as he
16 received it.

17 THE COURT: Where is that set forth?

18 MR. IVALDY: I'm sorry; I cannot hear you very well.

19 THE COURT: I don't -- where is that set forth? I can
20 tell you it's very unusual for anyone in our Clerk's office to
21 give anyone a statement that something is timely or not.

22 MR. IVALDY: When did you file your order?

23 THE COURT: The order, itself, was entered April 15th.

24 MR. IVALDY: That's correct. And then I have ten days
25 to respond, is that correct?

1 THE COURT: Well, in fact, you had more than ten days,
2 because April 25th was a Saturday.

3 MR. IVALDY: Okay. So you would receive it on the
4 following Monday then.

5 THE COURT: The 28th. I'm sorry, the 27th.

6 MR. IVALDY: Yes, the 27th, is that correct?

7 THE COURT: That would have been timely. But our
8 records show that it was actually docketed on the 28th.

9 MR. IVALDY: Yes. But the clerk had received it in a
10 timely fashion and notified me of that.

11 THE COURT: Do you have any record of that?

12 MR. IVALDY: Do you want me to pull out my records
13 from Express Mail showing that you received it in a timely
14 fashion? Are we going to play the same game that the District
15 Court played with me?

16 THE COURT: Well, it's not a game, sir, this is
17 important.

18 MR. IVALDY: I perceive it as a game.

19 THE COURT: All right. Why don't we move to the next
20 point then?

21 MR. IVALDY: If you want me to I will get my records
22 showing that the papers were filed in a timely manner. And as
23 far as I'm concerned, Weil Gotshal is playing a game with me.
24 They have the papers; they received the papers the same day as
25 you did.

1 If Weil Gotshal is willing to submit an affidavit that
2 they did not receive it in a timely fashion then let them do
3 it. But as far as I'm concerned, without that affidavit this
4 is a non-issue.

5 THE COURT: Well, no, that's not really right. It was
6 filed on the 28th.

7 MR. IVALDY: I don't care when it was filed --

8 THE COURT: Well, I do. That's the date that sets the
9 timeline unless something extraordinary shows that it was
10 received and should have been filed at an earlier date. And I
11 have no evidence of that fact. Do you have an affidavit of
12 service or filing?

13 MR. IVALDY: Yes.

14 THE COURT: Where is that?

15 MR. IVALDY: I beg your pardon?

16 THE COURT: Where is it?

17 MR. IVALDY: I have it.

18 THE COURT: Did you file it?

19 MR. IVALDY: I have from the Clerk that my papers were
20 filed on time.

21 THE COURT: No, no. Did you file it with the Court,
22 the affidavit of service?

23 MR. IVALDY: Yes. Along with the papers.

24 MR. WAISMAN: Your Honor, with Mr. Ivaldy's notice of
25 appeal, there appears a certificate of service signed by Mr.

1 Ivaldy indicating that he sent, by U.S. Mail on April 24th, his
2 notice of appeal to Your Honor's chambers, our offices, the
3 Solicitor General of the United States, and the United States
4 Attorney General.

5 Irrespective of that, the docket clearly indicates the
6 appeal was not filed until the 28th. And notwithstanding Mr.
7 Ivaldy's pro se appearance in these cases, he is very familiar
8 with the rules of procedure, has filed over a hundred
9 pleadings, and has repeatedly appeared before this Court. And
10 as he indicates, the District Court, as well. And has been
11 repeatedly admonished that the rules aren't a game and they
12 need to be complied with.

13 THE COURT: Okay.

14 MR. IVALDY: I think we should ask Weil Gotshal the
15 date that they received my notice.

16 THE COURT: No, that's not the relevant issue. The
17 issue is when it was received by the Clerk of the Court.

18 MR. IVALDY: It was the Clerk of the Court received it
19 the same day that Weil Gotshal did.

20 THE COURT: All right. Did you have anything else on
21 this?

22 MR. IVALDY: Are you speaking to me?

23 THE COURT: Yes.

24 MR. IVALDY: Not on this issue.

25 THE COURT: Okay. Anything else?

1 MR. IVALDY: I think that Weil Gotshal should be able
2 to make a statement on the date that they received it.

3 THE COURT: I already told you that's not relevant.

4 MR. IVALDY: Well, the date --

5 THE COURT: Okay. Do you have anything else, Mr.
6 Ivaldy?

7 MR. IVALDY: On this issue, no.

8 THE COURT: Okay. On anything else?

9 MR. IVALDY: Well, of course. I mean, I was given an
10 agenda that had gotten to me today. But I never had it before.
11 And there's a service list that was sent by Federal Express.
12 Federal Express didn't give it to me on time for this hearing,
13 number one.

14 And the affidavit previously by Donald Agean on his
15 affidavit of service -- from my perception, his affidavit of
16 service was late. So I don't understand what the --

17 THE COURT: But --

18 MR. IVALDY: I think that what you have to do -- what
19 I urge the Court to do is have a five-minute recess and you
20 check with the Clerk and see when they got this notice of
21 appeal. I think that that would be the easiest thing and --

22 THE COURT: All right. Do you have anything else, Mr.
23 Ivaldy?

24 MR. IVALDY: I filed my notice of appeal in a timely
25 manner.

1 THE COURT: Okay.

2 MR. IVALDY: I see no documentation that it hasn't
3 been done.

4 THE COURT: All right. Okay. I have before me the
5 debtors' motion to dismiss Mr. Phil Ivaldy's appeal. My order
6 dated April 15, 2009 closing the debtors' chapter 11 case.

7 The debtor seeks various alternative forms of relief
8 in its motion. But the first form of relief it seeks is really
9 a gatekeeping item. The debtor contends that Mr. Ivaldy's
10 appeal was untimely and, therefore, that it should be
11 dismissed.

12 MR. IVALDY: They have not given any proof of that.

13 THE COURT: I'm giving my ruling, sir; I'm not in oral
14 argument at this point.

15 MR. IVALDY: Okay.

16 THE COURT: As far as the motion is concerned, there
17 are three issues as I see it.

18 First, is the issue as to whether this is an issue
19 that the Bankruptcy Court should address or whether it's an
20 issue properly addressed by the District Court to which the
21 appeal was directed. Generally speaking, the filing of a
22 notice of appeal divests the lower court of jurisdiction over
23 matters covered by the appeal. However, the timely filing of a
24 notice of appeal is mandatory in jurisdiction. If the notice
25 is not timely filed, the Appellate Court is without

1 jurisdiction to hear the appeal. That's a quote from In re
2 Williams, 216 F.3d, 1295, 1298 (11th Cir. 2000).

3 More specifically, this issue has been addressed by,
4 at least, one court directly. Where the court found that the
5 Bankruptcy Court had jurisdiction to consider the timeliness of
6 the notice of appeal as this ruling said. The notice of appeal
7 from the final order generally deprives a lower court over
8 jurisdiction over the merits of the matter subject to appeal.
9 However, the Bankruptcy Court retains certain authority
10 concerning the timeliness of the appeal. Including, for
11 example, the authority to extend the period of time for filing
12 a notice of appeal, pursuant to Rule 8002(c)

13 In any event -- and I'm sorry, that's in In re Geiger,
14 2006 U.S. District LEXIS 39570, pages 2-3 (W.D. Wisconsin June
15 12, 2006). So I believe that it is appropriate for me to
16 decide this issue.

17 Secondly, there's an issue, given the fact that Mr.
18 Ivaldy is pro se, as to whether I should view an untimely
19 notice of appeal as treated for him as a request for an
20 extension of time to file the notice of appeal, which would, if
21 I would do that, at the time, given the time he filed it, be
22 liberally granted. However, the Second Circuit has made it
23 clear that a party's filing of a late notice of appeal, even
24 when the party is pro se and provides affording evidence of
25 excusable neglect, cannot be treated as an application to

1 extend the time to file a notice of appeal. Campos v. LeFevre,
2 825 F.2d 671, 676 (2d Cir. 1987). See also In re R.H. Macy and
3 Company, 173 B.R. 301 at 302 (S.D.N.Y. 1994).

4 Finally, there's the underlying issue whether the
5 appeal was, indeed, untimely. The certificate of service
6 indicates that the appeal was filed on April 24th -- I'm sorry,
7 it was mailed on April 24, 2009, which would have fallen within
8 the proper timely period for an appeal from the April 15, 2009
9 order. However, mailing does not start the -- or count as far
10 as the time to appeal is concerned. The time of filing of the
11 notice is measured not from mailing but from actual receipt by
12 the Bankruptcy Clerk. In re Geiger, again, 2006 U.S. District
13 LEXIS 39570 at pages 3-4, citing In re Maurice, 69 F.3d 830-832
14 (7th Cir. 1995), as well as Bankruptcy Rule 8002(a).

15 Here, the appeal is not shown as having been filed
16 until April 28, which was a day after the expiration of the
17 time --

18 MR. IVALDY: You have --

19 THE COURT: Excuse me. Of the time to appeal. And
20 that evidence of filing, without any evidence to the contrary
21 other than Mr. Ivaldy's statement over the phone at this
22 hearing, that he believes it was received before the 28th, to
23 my mind is sufficient to establish the untimeliness of the
24 appeal.

25 So for those reasons, in the absence of any proof to

1 the contrary, I will treat the filing date as the receipt date
2 and find that the appeal is untimely and should be dismissed.

3 In light of that, I don't believe that it would be
4 appropriate to address the other forms of relief sought in the
5 motion.

6 MR. WAISMAN: Thank you, Your Honor. Would Your Honor
7 like us to settle an order?

8 THE COURT: Just submit the order.

9 MR. WAISMAN: Thank you, Your Honor, we will.

10 MR. IVALDY: What are you going to do if you find out
11 later that it was received on time?

12 THE COURT: I am not going to check, that's not what
13 judges do.

14 MR. IVALDY: But what are you going to do if I
15 submit -- if I get the Court to --

16 THE COURT: I will have to decide that if and when you
17 make such a motion.

18 All right.

19 MR. WAISMAN: Thank you, Your Honor.

20 THE COURT: Thank you.

21 (Proceedings concluded at 1:03 p.m.)
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I N D E X

R U L I N G S

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Motion of Debtors' to Dismiss 14 2
Phil Ivaldy's Appeal as Untimely,
Granted

C E R T I F I C A T I O N

I, Esther Accardi, certify that the foregoing transcript is a
true and accurate record of the proceedings.

ESTHER ACCARDI

Certified Electronic Transcriber (CET**D-485)

Veritext LLC

200 Old Country Road

Suite 580

Mineola, New York 11501

Date: June 18, 2009

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

-----X
In re : **Chapter 11 Case No.**
 :
LEHMAN BROTHERS HOLDINGS INC., et al., : **08-13555 (JMP)**
 :
Debtors. : **(Jointly Administered)**
-----X

**ORDER STRIKING FROM THE RECORD WILLIAM KUNTZ'S
NOTICE OF APPEAL OF THE ORDER AUTHORIZING LEHMAN
COMMERCIAL PAPER INC. TO PURCHASE FAIRPOINT PARTICIPATION**

Upon the Motion dated December 16, 2009 (the "Motion"), of Lehman Commercial Paper Inc. ("LCPI") and its affiliated debtors in the above-referenced chapter 11 cases, as debtors in possession (together, the "Debtors"), to strike from the record of these cases the notice of appeal (the "Notice of Appeal") filed by William Kuntz, III ("Kuntz") of the order of this Court, entered on October 16, 2009, authorizing LCPI to purchase a participation in the loan known as FairPoint Communications Term Loan A from Variable Funding Trust 2008-1 [Docket No. 5551] (the "FairPoint Order") or, in the alternative, to dismiss the appeal of the FairPoint Order; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with 28 U.S.C. §§ 157 and 1334 and the Standing Order M-61 Referring to Bankruptcy Judges for the Southern District of New York Any and All Proceedings Under Title 11, dated July 10, 1984 (Ward, Acting C.J.); and consideration of the Motion and the relief requested therein being a core proceeding pursuant to 28 U.S.C. §157(b); and venue being proper before this Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice having been provided in accordance with the procedures set forth in the amended order entered February 13, 2009 governing case management and administrative procedures [Docket No. 2837] to (i) the United States Trustee for the Southern District of New York; (ii) the attorneys for the Official

Committee of Unsecured Creditors; (iii) the Securities and Exchange Commission; (iv) the Internal Revenue Service; (v) the United States Attorney for the Southern District of New York and (vi) Kuntz, and it appearing that no other or further notice need be provided; and a hearing having been held to consider the relief requested in the Motion (the "Hearing"); and the Court having found and determined that the relief sought in the Motion is in the best interests of LCPI, its estate and creditors, and all parties in interest and that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefore,

THE COURT HEREBY FINDS, DETERMINES AND CONCLUDES THAT:

- A. Kuntz's motion (the "Motion to Extend") to extend the period set forth in the Rule 8002(a) of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules") was filed after the expiration of the period set forth in Bankruptcy Rule 8002(c).
- B. The Notice of Appeal was filed after the expiration of the period set forth in Bankruptcy Rule 8002(a).
- C. Kuntz did not claim nor offer any facts to support any claim of excusable neglect with respect to the untimely filing of the Motion to Enlarge or the Notice of Appeal.

FOR ALL OF THE FOREGOING AND AFTER DUE DELIBERATION THE COURT ORDERS THAT:

- 1. The Motion is hereby granted.
- 2. The Motion to Extend is denied.
- 3. The Notice of Appeal is stricken from the record of these cases.

Dated: January __, 2010

New York, New York

UNITED STATES BANKRUPTCY JUDGE